IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 25, 2006 at Knoxville

GERALD W. McCULLOUGH v. STATE OF TENNESSEE

Appeal from the Circuit Court for Bedford County
No. 9041 Charles Lee, Judge

No. M2004-02430-CCA-R3-PC - Filed July 7, 2006

The Bedford County Circuit Court, following a hearing, dismissed the post-conviction petition filed by Gerald W. McCullough, the petitioner, by which he had attacked his 1999 Bedford County jury conviction of aggravated sexual battery. In his appeal from the denial of post-conviction relief, the petitioner claims that his trial counsel rendered ineffective assistance by failing to take steps to challenge the state's use of evidence that showed instances of uncharged sexual misconduct of the petitioner and failing to preserve the record on this issue. We affirm the order of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

John H. Dickey, Fayetteville, Tennessee, for the Appellant, Gerald W. McCullough.

Paul G. Summers, Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael D. Randles and Ann Filer, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

The facts underlying the petitioner's 1999 conviction are summarized in this court's opinion in the petitioner's direct appeal:

> In June of 1998, Roy and Tammy Messick moved into a three bedroom mobile home in the Viking Trailer Park in Unionville with their four children: son DT, age 7; daughter HT, age 6; and two other daughters, ages 4 and 3. One month later, Ms. Messick's mother, Eunice York, and her boyfriend, Gerald McCullough, moved into the mobile home to live with the Messick family. The three girls slept in

one bedroom, Mr. and Mrs. Messick were in a second bedroom, and the defendant and Ms. York slept in the third. DT slept in the livingroom.

On July 28, Ms. Messick's friend, Sheila Geary, who lived across the street, walked towards the Messick residence to visit. At 10:00 P.M., as she approached the door, Ms. Geary looked through two large windows in the living room and observed the defendant, seated inside, masturbating in the presence of DT. The blinds were open and a lamp lit the inside of the living room. Ms. Geary testified that the defendant "had his pants undone, and he had his thing and he was masturbating . . . [a]nd [DT] was standing in between his legs, right in front of him." Ms. Geary knocked on the door and DT unlocked it, at which point Ms. Geary entered the residence and exclaimed to the defendant, "I saw what you have done." Ms. Geary then walked to the Messicks' bedroom and asked Ms. Messick to step outside, where she told Ms. Messick what she had seen. As she did so, the defendant paced back and forth in the living room. Approximately ten days later, Ms. Geary complained to Al Cacatory, the landlord of the trailer park, who contacted the sheriff's department. Ms. Messick was aware that Ms. Geary had arranged for the landlord to make the call. At the time of the offense, the defendant and Ms. York had rented a residence of their own but did not yet have electricity and other services. By the time Ms. Geary mentioned the incident to the landlord, the defendant and Ms. York had moved into their own dwelling.

There was proof at trial that after the defendant's arrest, he sent letters to Ms. York addressed to the Messick residence. In one letter, the defendant urged Ms. Messick and DT "to leave town" so as to miss a scheduled court hearing. The letter was signed "GX."

DT, a second grader, testified that the defendant "did a bad thing to me." He recalled that the defendant touched his penis more than once and that he had turned his head when the defendant tried to persuade him to look at his penis. He testified that on one occasion, the defendant "tried to make [him] suck it." DT stated that he refused. He recalled that on another occasion, while he was in bed, the defendant got into the bed and placed his penis against his bottom; DT stated that he had clothes on at the time and that he refused the defendant's request to remove his pants.

DT explained that the defendant got in bed with him one afternoon after school and that Ms.York was living at an apartment at that time. DT recalled that the Messicks had gone to the races that day. He stated that the day before, while the Messicks had gone to the store, the defendant had tried to show him his penis. Later in his testimony, DT conceded that the event may have occurred on a Saturday, when school was not in session. DT claimed that the defendant "tried to make [him] pull down [his] pants," but that he refused and the defendant did not touch him.

DT also remembered the night that Ms. Geary came into the residence. He testified that just before Ms. Geary entered, the defendant took his penis out of his pants. DT denied, however, that there was any sexual contact. DT recalled that the defendant instructed him "not to tell anybody . . . because he didn't want to get in trouble."

On redirect examination, DT testified that he would not allow the defendant to touch his penis and that he refused to cooperate on the day the defendant asked him to suck his penis. He stated that the defendant rubbed his penis on his bottom only once.

On August 10, 1998, Detective David Adams of the Bedford County Sheriff's Department, a member of the child protective investigative team, was notified of the incident witnessed by Ms. Geary. He and other officers interviewed the Messicks, DT, and Ms. Geary, and, on the next day, interviewed the defendant. Chief Deputy Dale Elliott assisted in the interview, which was conducted at the sheriff's department. In the initial interview, the defendant denied any type of inappropriate contact with DT. Afterward, the defendant was placed under arrest. Before being taken to jail, the defendant asked to make a second statement. Detective Adams testified that the defendant acknowledged that he had asked DT to touch his penis. When asked whether he had rubbed his penis on the body of DT, the defendant stated that he could not remember because he was "using marijuana at the time frame." Both statements were tape recorded.

At the conclusion of the evidence, the state elected to rely only upon the instance when DT claimed to have been touched on the bottom by the defendant while in the bedroom.

State v. Gerald W. McCullough, No. M1999-01525-CCA-R3-CD, slip op. at 2-3 (Tenn. Crim. App., Nashville, Aug. 18, 2000), *perm. app. denied* (Tenn. 2001).

Although the petitioner was originally charged with four counts of aggravated sexual battery, each count involving a different victim, one of which was DT, the counts were severed, and the single count involving victim DT was tried in the case now under attack. That count alleged that the petitioner committed aggravated sexual battery against DT on July 28, 1998.

In *Gerald W. McCullough*, this court explained the nature and disposition of the petitioner's appellate claim that evidence of improper conduct of the petitioner toward the victim in addition to that which formed the basis of the single aggravated sexual battery charge was erroneous:

> Initially, the defendant argues that the state improperly elicited evidence of at least five incidents of attempted sexual contact between the defendant and DT. He points out that DT testified that he touched DT's penis "more than once" and that he wanted DT to touch his penis and also "tried to make [DT] suck it." The defendant cites testimony by DT that he had tried (but failed) to take DT's pants off and that he had already touched the bottom of DT, who was wearing pants at the time. Because the defendant did not object at trial to the unindicted instances of misconduct, he relies upon the plain error doctrine in this appeal.
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> The state submits that the issue has been waived, not only because there was no contemporaneous objection to the testimony, but also because the ground was not included in the motion for new trial.
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> . . . [I]t is our view that the error here did not rise to the level of plain or obvious error. Initially, while our supreme court has been consistent in the general exclusion of uncharged sex crime testimony, the issue was not argued at all during the trial. Thus the record is not sufficiently developed for a complete analysis. Appellate counsel did not try the case, so he is at a disadvantage, as are we, in evaluating the issue in hindsight. For example, it is possible that trial counsel for the defendant chose not to object or to otherwise waive the issue for tactical reasons. Had the state been less specific in the indictment as to dates and times of the contact, the other references in the testimony to sexual impropriety on the part of the defendant might have been admissible under the special exception recognized in [*State v.*] *Rickman*[, 876 S.W.2d 824 (Tenn. 1994)]. The state did not have the opportunity to offer legitimate reasons for one of the several exceptions to [Tennessee] Rule [of Evidence] 404(b). The reference to other possible sex crimes is not nearly so significant in this case as in *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996), or *State v.*

> *Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). Moreover, DT testified that he refused to cooperate with the defendant's advances and had only marginal contact through clothing on the one occasion. Finally, the trial court did require an election on the part of the state to ensure a unanimous verdict on the specific incident in DT's bedroom. On balance, the factors weigh against a determination of plain error. In consequence, the issue must be treated as having been waived for failure to present the ground in the motion for new trial.

Id., slip op. at 3-7.

In the post-conviction evidentiary hearing[1] the petitioner's trial counsel of 15 years' experience testified that the indictment upon which the defendant was tried alleged that the charged offense occurred "on or about July 28[], 1998." Counsel filed no motion for a bill of particulars. He admitted that the victim testified to improper conduct of the petitioner that occurred on dates other than July 28, 1998, although the victim's confusion about the dates and time frames hampered his opportunity and ability to object to the supernumerary instances of misconduct. In any event, counsel agreed that he failed to object to the evidence of various instances of misconduct. He testified that the state elected to base a conviction upon an instance of the petitioner's rubbing his penis on the victim's buttocks. Counsel testified that he raised five issues in the petitioner's motion for new trial but agreed that he did not attack the use of evidence of uncharged misconduct in the motion.

Counsel opined that he had a sound knowledge of Tennessee Rule of Evidence 404(b). When the other-crimes evidence was offered, he opted to not object. He elaborated that he felt the evidence, showing the "story" of the crime, would be admitted and that if he objected unsuccessfully, "hav[ing] the jury excused, then come back in, and then hear the evidence I objected to, would be like turning on . . . a green light." He deemed it better to avoid the jury's thinking, "Look at what he is trying to hide." Additionally, counsel opined that, with the exception of the conduct that formed the basis for the conviction, the victim's testimony was confused. Counsel testified, "I think you only object to what hurts you. I felt like the objection would have [done] more harm than good." Counsel observed that the victim's testimony about "other" incidents created opportunities for him to explore the victim's confusion and inconsistent testimony.

The petitioner's appellate counsel, who was not the same person as trial counsel, testified that he raised on appeal the issue of admission of evidence of uncharged sexual conduct but was relegated to a claim of plain error because trial counsel had posed no objection to the evidence and had not raised the issue in the motion for new trial.

[1] Only the evidentiary-hearing testimony and the post-conviction court's findings that relate to the petitioner's appellate issues are summarized in the following paragraphs.

The petitioner testified in the hearing but did not address the admission of evidence of uncharged misconduct.

Following the testimony in the evidentiary hearing and the arguments of counsel, the post-conviction court termed "incorrect" trial counsel's opinion that an objection to the evidence of uncharged conduct would not have been granted. The court commented,

> Whether or not [the failure to object] is a tactical decision or not is questionable. Because the Court would not probably have admitted all of the instances of contact with the victim that the State was alleging but would have admitted at least the most obvious one and that is how this matter was brought to the attention of the authorities. That is if the defendant was engaging in a sex act in the presence of the young boy in close proximity was discovered as such.
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> That would have been admissible for a couple of reasons.
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> One, is that that sort of completes the story . . . of these instances of how it came to light to the authorities. And two, . . . it would have been admissible to show the intent of the defendant . . . [, that the touching] was a touching for sexual gratification.
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> It is doubtful the Court would have allowed the other alleged instances. . . . However, as [trial counsel] points out though, his objection would have called attention to that which the Court would have admitted. But since there was not an objection, then [counsel] is correct that the testimony that did come in was such that it was not particularly harmful to the defendant when you weigh the entire testimony.
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> The testimony of the victim in this case was very confusing.
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> The cross-examination [by trial counsel] of the [victim] did reveal several inconsistencies that could [inure] to the defendant's benefit.

The court denied post-conviction relief, and now on appeal, the petitioner asserts trial counsel's ineffectiveness regarding the uncharged conduct and claims that trial counsel's failure to preserve

and present the issue of admitting evidence of uncharged misconduct equates to ineffective assistance of counsel.

In post-conviction proceedings, the petitioner has the burden of proving by clear and convincing evidence the claims raised. Tenn. Code Ann. § 40-30-110(f) (2003). On appeal, the lower court's findings of fact are reviewed de novo with a presumption of correctness that may only be overcome when the evidence preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

When a petitioner challenges the effective assistance of counsel in a post-conviction proceeding, he has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel provides assistance that falls below the range of competence demanded of attorneys in criminal cases. *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994). Because a petitioner must establish both deficient representation and prejudice therefrom, relief may be denied when proof of either is deficient. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If prejudice is absent, there is no need to examine allegations of deficient performance. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. On review, there is a strong presumption of satisfactory representation. *Barr v. State*, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

In evaluating counsel's performance, this court should not examine every allegedly deficient act or omission in isolation, but rather we view the performance in the context of the case as a whole. *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The primary concern of the court should be the fundamental fairness of the proceeding of which the result is being challenged. *Id.* Therefore, this court should not second-guess tactical and strategic decisions by defense counsel. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). Instead, this court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. *Id.*; *see also Irick v. State*, 973 S.W.2d 643, 652 (Tenn. Crim. App. 1998).

In sum, a defendant is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126 (1987).

Applying these principles, we hold that the petitioner failed to establish in this post-conviction proceeding that he was prejudiced by his counsel's failure to preserve and present the issue of the use of evidence of uncharged misconduct.

In reaching this conclusion, we acknowledge the aptness of the post-conviction judge's comments that, as the trial judge, he would have excluded, upon the petitioner's objection, evidence of uncharged misconduct, except that he would have allowed the evidence of the masturbation incident. Tennessee Rule of Evidence 404(b), in general, prohibits the use of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of [an accused] in order to show action in conformity with the character trait." *See* Tenn. R. Evid. 404(b); *see also State v. James*, 81 S.W.3d 751, 758 (Tenn. 2002) ("The theory underlying Rule 404(b) is that the admission of other-acts evidence poses a substantial risk that a trier of fact may convict the accused for crimes other than those charged."). The evidence of the petitioner's uncharged sexual misconduct suggests that he had a propensity to committ the charged offense. *See State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994).[2] Thus, a legal basis existed for excluding the evidence, and the trial court apparently would have excluded most of the evidence had an objection been made.[3]

That said, a finding that the trial court, upon a proper objection being made, would have excluded most of the challenged evidence does not per se equate to a conclusion that the petitioner was prejudiced, as required by *Strickland*. We conclude and hold that the petitioner has failed to show that the outcome of the trial or appellate proceeding would have been different had the issue of evidence of uncharged misconduct been properly raised.

In reaching that conclusion, we begin with the finding that the trial court would have allowed evidence of the petitioner's masturbating in front of the victim. We believe that the admission of that evidence was sustainable as a function of that court's discretion. Character evidence may be admissible despite the prohibition of Rule 404(b) when the evidence of other acts is relevant to a material issue, such as identity, intent, or motive, when its probative value is not outweighed by the danger of unfair prejudice, *State v. Robinson*, 73 S.W.3d 136, 151-52 (Tenn. Crim. App. 2001), and when the evidence of the other act is clear and convincing, *State v. Parton*, 694 S.W.2d 299, 303 (Tenn. 1985). In the present case, as noted by the post-conviction judge, proof of the masturbation incident was relevant to show the manner in which the defendant's treatment of the victim came to light and, more importantly, to illustrate the petitioner's intent to achieve sexual

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[2] *Rickman* authorized the admission of "evidence of other sex crimes when an indictment is not time specific and when the evidence relates to sex crimes that allegedly occurred during the time as charged in the indictment." *Rickman*, 876 S.W.2d at 829. Otherwise, *Rickman* rejected the notion of a "sex crimes exception" to Rule 404(b). *Id.* Accordingly, *Rickman* availed the state in the petitioner's trial no avenue for using the evidence of the petitioner's uncharged sexual misconduct; the petitioner's indictment was essentially time specific, alleging that the offense was committed on or about July 28, 1998.

[3] Not only would the trial judge apparently have sustained a timely objection to the bulk of the challenged evidence, but a trial court's decision to exclude the evidence of the other incidents likely would have been supportable as a matter of the trial court's discretion against a state appellate claim. *See State v. Dubose*, 953 S.W.2d 649, 652 (Tenn. 1997) (stating that, when a trial court substantially complies with the procedural requirements of Tennessee Rule of Evidence 404(b), its determination will not be overturned absent an abuse of discretion). It is less clear, had an objection to the evidence been made, *see* Tenn. R. Evid.103(a), and the issue preserved in the motion for new trial, *see* Tenn. R. App. P. 3(e), that the trial court's *allowance* of the evidence would have been sustainable on appeal as a function of that court's discretion.

arousal or gratification, a necessary element of the charged offense. *See* Tenn. Code Ann. § 39-13-504 (a) (2003) ("Aggravated sexual battery is unlawful *sexual contact* with a victim by the defendant or the defendant by a victim accompanied" by any of the aggravated circumstances listed.) (emphasis added); *id.* § 39-13-501(6) ("*Sexual contact*" includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being *for the purpose of sexual arousal or gratification*") (emphasis added). We believe that, not only would evidence of this incident have served to establish the mental element of the crime, but also its probative value would have outweighed the danger of unfair prejudice.

In this situation, the legitimate use of the masturbation incident, articulated by a witness other than the victim, would have lessened the prejudicial impact of the other instances of uncharged sexual misconduct, which were all articulated merely by the less-than-cogent testimony of the victim. In sum, the petitioner did not establish in the post-conviction proceeding below that the outcome of the proceeding would have been different had counsel timely raised the Rule 404(b) issue. Indeed, the record supports the opposite conclusion. The post-conviction judge, who was also the trial judge, concluded that, in the absence of focus that may have been wrought by an objection, the evidence adduced by the victim's testimony was not "particularly harmful," in light of the totality of the evidence. This conclusion is supported in the record by trial counsel's testimony that the lack of a Rule 404(b) objection served to abate the impact of the victim's testimony and created an opportunity to exploit the confusing nature of the victim's testimony as a means of engendering reasonable doubt about the petitioner's guilt.

Accordingly, we conclude that the record supports the circuit court's conclusion that the petitioner failed to establish ineffective assistance of counsel, and we affirm the denial of post-conviction relief.

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JAMES CURWOOD WITT, JR., JUDGE